

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF ALABAMA
4 SOUTHERN DIVISION

5 IN RE BLUE CROSS BLUE SHIELD * December 15, 2015
6 ANTITRUST LITIGATION MDL 2406 * Birmingham, Alabama
7 2:13-cv-20000-RDP * 2:27 p.m.

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9 TRANSCRIPT OF DISCOVERY CONFERENCE
10 BEFORE THE HONORABLE T. MICHAEL PUTNAM
11 UNITED STATES MAGISTRATE JUDGE

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P R O C E E D I N G S

THE COURT: Good afternoon. This is in the In Re Blue Cross Blue Shield Antitrust Litigation, MDL 2406. And that is a Northern District of Alabama number, 2:13-cv-20000-RDP.

And let me apologize for the late start. But as is usually the case, we had a brand new sound system and telephone system put in about two weeks ago. And as with most government contracts, of course, it doesn't work. So we finally have something patched up here and working. But I wanted to go ahead and get started with the discovery conference.

I have on the agenda this afternoon to get some updated information, again, about the meet and confer process, as we've been going for some time.

Mr. Ragsdale?

MR. RAGSDALE: Thank you, Your Honor.

We have continued the meet and confer process pursuant to the directions that we received from the Court and, frankly, from each other over the course of the last several weeks.

There were at least two in-person meet and confers with various parties as well as a number of telephone meet and confers. And I think all counsel were able to work that in through their holiday schedule; although, we're not done

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1 yet; although, we made a lot of progress. Some of that has
2 been set out in the papers that you have received.

3 Progress has been made on a number of fronts.
4 Remaining are some meet and confers we're going to try to
14:28:54 5 work in, including tomorrow.

6 One of the issues that we are hoping to discuss is
7 what discovery needs to be done or planned or anticipated
8 involving the defendants' anticipated filed rate motions,
9 including that to be filed by Blue Cross of Alabama. In
14:29:10 10 fact, we're talking about getting together and discussing
11 that tomorrow.

12 We're very close to having finalized agreements on a
13 number of points. Obviously, there are still points of
14 disagreement that we continue to talk about, at least one of
14:29:24 15 which -- or two of which -- is on the docket for you today.

16 THE COURT: Okay. And I guess sort of
17 dovetailing into that is sort of looking down the road at the
18 horizon, what sort of discovery issues might yet still be
19 coming out of the meet and confer process that we might be
14:29:40 20 dealing with in January?

21 MR. RAGSDALE: I think a fairly broad
22 spectrum of issues still remain. We know there's -- we
23 anticipate at least once we have the opportunity to set out
24 the types of discovery, for example, that we want on filed
14:29:54 25 rate -- although I suspect we will be able to reach an

1 agreement on most of that, there may still be some scheduling
2 issues. Some of that will depend on, frankly, Judge
3 Proctor's scheduling of how those motions are going to be
4 filed and the deadlines that may be created for the
14:30:08 5 consideration of those motions.

6 In addition to that, depending on, frankly, how some
7 of the time period issues get resolved between the parties,
8 certainly involving the association, that may provide
9 guidelines for the other defendants in terms of how we want
14:30:22 10 to proceed.

11 We're close. I think very close. Probably even
12 done with an end-date agreement on structured data, for
13 example, that we hope we can get all the defendants to agree
14 to once we're able to reach that.

14:30:36 15 Other than that, I don't know what might pop up.
16 But I suspect, just based on past experience, that we will be
17 able to reach agreement on most things and be unable to reach
18 agreement on some things.

19 THE COURT: All right.

14:30:52 20 Ms. Yinger? Ms. West?

21 MS. WEST: Ms. Yinger is going to address
22 the Court.

23 THE COURT: Thank you.

24 MS. YINGER: Good afternoon, Your Honor.

14:31:06 25 I think the only thing I would add is that we are

1 continuing to meet and confer on behalf of the non-Alabama
2 defendants with respect to what discovery the plaintiffs plan
3 to prioritize in the accelerated actions for the non-Alabama
4 defendants.

14:31:28 5 I think that -- you know, the defendants had
6 proposed that we go ahead and talk about that right away.
7 But the plaintiffs wanted a little more time.

8 We're expecting a proposal from them on December
9 23rd. And that will give us a better sense of where that
10 filed rate discovery fits into that bigger picture.

11 So I think once we have more information from the
12 plaintiffs about how they see discovery rolling out next
13 year, we'll be able to address a number of issues with the
14 Court, if needed.

14:32:08 15 THE COURT: All right.

16 MS. YINGER: Thanks.

17 THE COURT: Thank you.

18 The next item that I have down on the agenda is the
19 plaintiffs' motion to compel Blue Cross Blue Shield of
14:32:22 20 Alabama to designate two particular people, Koko Mackin and
21 Robin Stone, as production custodians.

22 Mr. Ragsdale?

23 MR. RAGSDALE: Thank you, Your Honor.

24 As is the case with the other defendants, frankly,
14:32:38 25 we made substantial progress with Blue Cross of Alabama,

1 negotiating on this particular issue; that is, the
2 designation of custodians. We were able to reach agreement
3 on all but two. And the two are outlined in the motion that
4 we have put before you.

14:32:56 5 We believe -- and I think it's important to put it
6 in context, of course. We haven't taken depositions yet.
7 We've begun to receive documents but not nearly what we
8 anticipate. So that, to some degree, this motion has to be
9 made based on what we anticipate.

14:33:12 10 And so that -- I think, for example, when Blue Cross
11 of Alabama argues that we have not definitively established
12 what we will get from these two custodians, that's true,
13 because we haven't had the opportunity to find out yet.

14 And that's what -- we think our motion focuses on
14:33:30 15 the fact that these two individuals are almost certainly
16 likely to have unique information regarding their dealings
17 with third parties and the outside public. It is the nature
18 of their jobs.

19 Ms. Mackin is vice-president of corporate
14:33:44 20 communication and community relations. She is the face and
21 the spokesperson for Blue Cross.

22 Mr. Stone is the vice-president of governmental
23 affairs and is the registered -- and has been a registered
24 lobbyist for Blue Cross of Alabama for more than several
14:34:02 25 years.

1 We believe that it is important that we preserve and
2 have access to the documents of these two individuals. And
3 it seems to me that their relevance, frankly, is clear on the
4 face of the fact that this case will focus on a number of
14:34:20 5 issues involving Blue Cross of Alabama, not the least of
6 which is simply their participation in what we have alleged
7 to be a nationwide conspiracy, but in addition to the fact
8 that, for example, filed rate will be a significant issue in
9 this case.

14:34:34 10 The fact that we've asked them to preserve the
11 records of their vice-president for governmental affairs who
12 would have interactions with the regulators and the
13 governmental entities which ostensibly set that filed rate
14 puts this, frankly, right in the wheelhouse of the defense
14:34:54 15 that we anticipate that Blue Cross will raise as a result of
16 that.

17 We believe that these two individuals, based on what
18 we have access to -- Blue Cross of Alabama is very critical
19 of the fact we're relying on media reports. But, at least at
14:35:08 20 this point, that's what we have access to. And it provides
21 the clues for these two individuals.

22 The real question is: Is there a concomitant
23 increase in the burden on Blue Cross of Alabama to have to
24 have these two individuals designated as custodians?

14:35:26 25 I would simply point out that I believe Blue Cross

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1 of Alabama's arguments are almost self-contradictory. Their
2 argument is that it's thousands and thousands and thousands
3 of additional documents that would have to be reviewed.

4 But on the same token, they argue that there's
14:35:44 5 nothing unique about any of the information that they have
6 access to; that it will be redundant and duplicative of
7 documents that we're getting from other sources. Both of
8 those things can't be true.

9 Either the information is unique and, therefore,
14:35:56 10 should be subject to discovery, or it's duplicative and,
11 frankly, would be weeded out through the process that they,
12 undoubtedly, will go through in which duplicate documents
13 won't be produced.

14 There's -- it's called de-duping. And it is a
14:36:14 15 process by which -- completely different than duping, by the
16 way.

17 THE COURT: I've been on the end of that
18 many times.

19 MR. RAGSDALE: Okay. Yeah. Not nearly as
14:36:20 20 much fun. But --

21 THE COURT: No.

22 MR. RAGSDALE: -- duplicate -- to the
23 extent that there are emails or other documents which are
24 duplicates of documents that are already being produced or
14:36:30 25 preserved, they won't be produced. There's no additional

1 burden that has to be done.

2 If they are not -- and more importantly, if they
3 involve communications with people outside the Blue Cross
4 structure, then they are unique. And they are discoverable.
14:36:42 5 And they are the kind of information that should be preserved
6 and produced. And we believe that, frankly, Blue Cross has
7 not made the kind of showing that's necessary that adding
8 these two individuals will substantially increase the
9 discovery burden that will be imposed on them.

14:36:58 10 Other than that, I think our position is set out in
11 our paper. If you have questions, I'd be glad to answer
12 them.

13 THE COURT: All right. Thank you.

14 MR. RAGSDALE: Thank you, Judge.

14:37:04 15 THE COURT: Argument for Blue Cross
16 Alabama?

17 MS. WEST: Yes, Your Honor.

18 Mr. Malatesta will be arguing.

19 THE COURT: Thank you.

14:37:10 20 Mr. Malatesta?

21 MR. MALATESTA: Good afternoon, Judge.

22 THE COURT: Good afternoon.

23 MR. MALATESTA: Forgive me. I got a
24 little bit of a cold today.

14:37:16 25 I'm not as organized. I got to set up, unlike

1 Mr. Ragsdale.

2 All right. Before I get into the argument, Your
3 Honor, what I would like to do is provide a little bit more
4 context to how we got here. Because I think it's
14:37:38 5 important to set the backdrop. Especially in light of some
6 of Mr. Ragsdale's remarks that they're operating with
7 incomplete information.

8 I would argue, to the extent they have any
9 intelligence on those witnesses that they believe to be
14:37:48 10 relative to the proceedings in this case, it would be Koko
11 Mackin and Robin Stone. Because the foundation for their
12 position has always been it's in light of the public
13 statements they've made, either in articles or to the
14 legislature.

14:38:02 15 So over the course of the last six months, we have
16 been negotiating production custodians. And the backdrop for
17 that has been our production of organizational charts. And
18 they've had the benefit of those organizational charts. And
19 we, obviously, have consulted with our client to identify who
14:38:18 20 we believe are the employees within the company that are best
21 positioned to answer these specific RFPs.

22 And so back in July, we sent them a fairly lengthy
23 letter that outlined our position not only on the scope of
24 the requests for production but how those RFPs should be
14:38:38 25 assigned within the organization.

1 And what we did is we took filed rate approach. We
2 basically got eight divisions. We got our executive office.
3 And then we've identified seven specific business divisions
4 where we think there are individuals within those divisions
14:38:48 5 that are going to have information responsive to the RFPs:
6 Sales and marketing, actuarial, claims, networks, legal, and
7 then the chief medical officers and the executives.

8 And what we did is identify 23 individuals within
9 the executive office and those business divisions that we
14:39:10 10 felt would be -- would have documents responsive to these
11 requests for production. And in many instances, as we noted
12 in our papers, we've already assigned, on average, seven
13 custodians to these requests that are at issue today.

14 So we believe we have taken a defensible approach to
14:39:28 15 the identification of production custodians and have
16 identified those individuals that are likely to have
17 responsive records.

18 Now, the plaintiffs have articulated that the
19 standard is relevance, in and of itself. And we disagree,
14:39:40 20 and we've articulated to the Court that we believe that there
21 is sort of a three-prong standard that must be examined in
22 order for the Court to find that the motion should be
23 granted. That is, first showing of relevance; second, that
24 these individuals do have unique, noncumulative information
14:40:00 25 responsive to the RFPs; and third, that the additional burden

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1 is, in fact, proportionate to the needs of the case.

2 And I'm going to walk through each of those in turn,
3 although there's certainly some redundancy on some of those
4 issues.

14:40:12 5 Let me begin first with relevance. It is the
6 plaintiffs' burden to prove relevance. And we appreciate the
7 fact that, to some degree, they are operating in a vacuum.
8 But nevertheless, with the benefit of the organizational
9 charts, we were able to reach agreement on the production
14:40:28 10 custodians.

11 And again, their foundation for having Mackin and
12 Stone designated as production custodians has been their
13 public statements.

14 So during the meet and confer process, time and time
14:40:38 15 again, we said, show us the underlying statements that
16 Ms. Mackin and Mr. Stone have made to substantiate the
17 requests, and we'll take it under review.

18 During meet and confer process, they cited the
19 single article to Koko Mackin. It's a September, 2007,
14:40:54 20 *Birmingham Business Journal* article that really sort of just
21 documents her progression through the company.

22 At the time, she was involved with project
23 management issues and then became the vice-president of
24 corporate communications in April, 2009.

14:41:06 25 With respect to Mr. Stone, during the meet and

1 confer process, they just identified generically several
2 issues that they claim he had taken up either in Montgomery
3 with the legislature or had been quoted in various roundtable
4 discussions. And now the Court has the benefit of some
14:41:20 5 articles that they have cited in their brief.

6 We have prepared for the Court a summary of those.
7 And we're happy to submit the actual articles themselves if
8 you would like. May I approach with a copy?

9 THE COURT: Sure.

14:41:52 10 MR. MALATESTA: And Your Honor, there's
11 obviously a fair amount of detail here. But we would
12 encourage the Court to review these after the hearing to
13 inform its decision on the motion. Because when you really
14 study these articles, what you realize is that there is no
14:42:04 15 factual nexus between the statements which they contend to be
16 underpinnings for having these two individuals designated as
17 production custodians and then the RFPs themselves.

18 And I'm going to walk through some illustrative
19 examples. We did so in our papers, as well.

14:42:10 20 But when you look at these articles -- and I'll
21 begin with Ms. Mackin. 14 of the articles deal with the
22 impact of healthcare reform. There's a lot of discussion in
23 the press, as you would anticipate, when President Obama was
24 contemplating the Affordable Care Act. And then, of course,
14:42:24 25 it was upheld constitutionally by the Supreme Court in 2012.

1 And there were a lot of articles discussing what's the impact
2 of that going to be on the healthcare marketplace, generally,
3 and then, more specifically, healthcare insurers, one of
4 which, obviously, is our client.

14:42:44 5 Notably, you know, most of the Affordable Care Act
6 was not even put into effect until after these lawsuits were
7 filed. So marginal relevance in that regard.

8 And then several of the articles are commentary on
9 these lawsuits. Just standard commentary by Ms. Mackin and
10 others that, you know, we're going to vigorously defend the
11 lawsuit. That does not provide indicia of relevant, unique
12 information responsive to these RFPs.

13 Others are what I would label high-level statements
14 about the company's financial performance. You know,
14:43:18 15 comments by Ms. Mackin about how the company performed
16 financially in 2009, 2010.

17 There are one or two articles that may speak to
18 market share or premium increases. Again, we don't believe
19 that those limited citations substantiate having them
14:43:34 20 designated to comb their records for what could be, depending
21 on how the Court rules on discovery time frame, a decade of
22 information.

23 And then with Mr. Stone, we feel like it's even more
24 tangential when you look at the specific articles. One is
14:43:48 25 Mr. Stone's comments on a bill pending in the legislation

1 about whether or not the legislation should impart a mandate
2 on certain autism benefits.

3 Another concerns Medicare Advantage increases for
4 certain residents of Hale and Tuscaloosa Counties on the
14:44:04 5 Medicare Advantage product. Again, very tethered -- or not
6 tethered, I should say, to the underlying RFPs.

7 So when you look at the requests -- and this has
8 really been the focus of our position during the meet and
9 confer process is let's compare these statements which you
14:44:22 10 contend are clearly relevant to the underlying RFPs for which
11 they want to be designated.

12 They want to designate Ms. Mackin for 62 of the
13 requests for production. They want to designate Mr. Stone
14 for 66 of the requests for production. So we're talking
14:44:34 15 about about 40 percent of the 159.

16 The requests are as follows: The creation of the
17 association, Requests 7 through 10; the rules and regulations
18 of license agreement, 14 and 23; association committee
19 meetings and board activities by the association, Requests 15
14:44:52 20 through 19; the creation of Blue Card back in the mid-90s;
21 the pre-cursor to the operation of the Blue Card in the 1980s
22 and early 1990s; the various interaction between control
23 plans and participating plans in the national account scheme;
24 organizational charts; the use of MFNs; our interaction with
14:45:12 25 the consortium.

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1 Those are the requests that they believe we should
2 designate Stone and Mackin to be production custodians. The
3 articles have nothing to do with those issues. And for that
4 reason, we've said, this dog won't hunt. They should not be
5 designated as production custodians.

6 Then for some of those issues that I mentioned
7 earlier, like, financial performance; market share; you know,
8 premium increases, there's very limited discourse by
9 Ms. Mackin on those issues. Again, very high-level
10 statements about, you know, how those are going to improve.

11 By way of example, here's one on financial -- the
12 financial performance that they cite. This is a "Blue Cross
13 Returns to Profitability," an August 8th, 2010, article from
14 the *Birmingham Business Journal*. The quote from Ms. Mackin
15 is as follows: Quote, there were several factors that led to
16 our net loss in 2009: The downturn in the economy,
17 struggling financial markets, and increasing healthcare
18 costs. That's their -- that's their factual justification
19 for making her a production custodian on financial RFPs.

20 What we've said to the plaintiffs and what we ask
21 the Court to do so here is say that the existing production
22 custodians we've designated for our financial issues is more
23 than sufficient. What we've done is actually go to the
24 controller of the company and say, produce information
25 responsive to their financial requests for production, like,

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1 total revenues, Blue Card payments. That is the correct
2 source of this information.

3 There's no reason for Blue Cross Blue Shield of
4 Alabama to now look for high-level statements about
14:46:50 5 operational performance when we know we're going to get that
6 information directly out of the financial department. In
7 fact, we've made a production of our audited financial
8 statements. That should speak to the financial performance
9 of the company.

14:47:00 10 There's no need to go look at Ms. Mackin's records
11 for the very same thing, which leads to the second part of
12 our argument which is that to the extent some of these
13 issues, like, market share or financial performance, do touch
14 about issues that Ms. Mackin and Mr. Stone have addressed in
14:47:16 15 the media, it's cumulative. And it's certainly not going to
16 lead to the unique information.

17 The 11th Circuit has said the following: Quote,
18 where a significant amount of discovery has been obtained and
19 it appears that further discovery would not be helpful in
14:47:30 20 resolving the issues, a request for further discovery is
21 properly denied. And that's exactly where we find ourselves
22 here.

23 As we've represented to the Court in our papers,
24 we've already collected ten million files to be searched. We
14:47:46 25 believe that is a more-than-adequate response to capture

1 information responsive to these RFPs.

2 We don't see the need to now engage in discovery of
3 what amounts to approximately 500,000 additional files that
4 belong to Ms. Mackin and Mr. Stone.

14:47:58 5 We believe that this is certainly calling for the
6 production of cumulative information, which the 11th Circuit
7 has discouraged.

8 And we would ask that the Court deny the motion in
9 that regards, as well.

14:48:10 10 When you look at specific issues, like, market share
11 or premium increases, again, Your Honor, they've asked
12 Ms. Mackin and Mr. Stone to be designated as production
13 custodians for Requests 66 through 81. Those deal with
14 market-share type issues.

14:48:26 15 We've already said our entire sales and marketing
16 department and all of -- I should clarify. The seven people
17 we've designated within our sales and marketing department,
18 the seven people we've designated within our network
19 department, and our CEO and our former CEO -- we agreed to
14:48:42 20 search all of those records to recover information about
21 market share.

22 Why do we now need to go to Ms. Mackin and
23 Mr. Stone? It's completely redundant. It's going to require
24 the consumption of resources and time that we don't need to
14:48:54 25 direct on those individuals, given the streamlining order

1 that the Court has entered.

2 And then third and lastly, this would not be
3 proportional to the needs of this case, as Rule 26 mandates
4 and which has been reinforced by the recent amendments to the
14:49:10 5 Federal Rules of Civil Procedure.

6 We've cited some cases, Your Honor, where there is
7 no foundation to have these individuals designated.

8 Mr. Ragsdale said we need to speculate to some
9 degree. Your Honor, I would say that if any speculation
14:49:24 10 needs to be made here, it is that there is no additional
11 information to be uncovered from Mackin and Stone that's
12 unique to these issues in the case.

13 And we would ask that the Court deny the motion on
14 those, as well.

14:49:36 15 THE COURT: All right.

16 MR. MALATESTA: That's it, Your Honor,
17 unless you have any questions.

18 THE COURT: I guess the question that
19 comes to my mind is, certainly, Rule 26(B)(1) in the
14:49:46 20 definition of the scope of discovery talks about the
21 relevance of the discovery and has moved the proportionality
22 considerations that previously were under 26(B)(2) -- have
23 moved those up now into the definition of the scope.

24 I'm curious about where this idea of uniqueness
14:50:08 25 comes from unless it has something to do with the

1 burdensomeness of discovery, perhaps some element of
2 proportionality.

3 But is there a requirement in Rule 26 that the
4 discovery requested from multiple sources within an
14:50:30 5 organization -- that each one of those sources be unique in
6 some sort of way?

7 MR. MALATESTA: Yes, Your Honor. Rule
8 26(B)(2)(c), Roman Numeral I, quote, the Court must limit the
9 frequency or extent of discovery otherwise allowed by these
14:50:48 10 rules or by local court -- local rule if it determines that
11 the discovery sought is unreasonably cumulative or
12 duplicative.

13 And then as I cited earlier, Your Honor, to the 11th
14 Circuit, where it has prohibited additional discovery. And
14:51:00 15 so we would believe not only do the rules but the controlling
16 caselaw deny the motion.

17 THE COURT: All right. So you equate
18 uniqueness with or the absence of uniqueness with being the
19 same thing as unreasonably cumulative or duplicative?

14:51:22 20 MR. MALATESTA: We do.

21 THE COURT: Okay.

22 MR. MALATESTA: I mean, Your Honor --

23 THE COURT: There's no middle ground
24 between them anywhere?

14:51:26 25 MR. MALATESTA: Well, we acknowledge that

1 there is some overlap with our existing slate of production
2 custodians. And that's why we've agreed to go to different
3 business divisions within the company to say we expect sales
4 and marketing to have the primary documentation on market
14:51:40 5 share, by way of example, but we're also going to look to our
6 executive office files, because we obviously anticipate that
7 Mr. Kellogg, the president/CEO of the company, may have
8 information. And that could spill over to some other areas.
9 And so we've designated those individuals.

14:51:54 10 THE COURT: On all of these requests for
11 production -- and I have to say that, frankly, I'm looking
12 for a little bit of redundancy. But -- I'm not asking for an
13 unreasonable degree of redundancy.

14 But on requests for production, it seems to me that
14:52:16 15 there ought to be multiple potential sources from which
16 information responsive to a request might come so that you're
17 not so limited in -- limiting yourself to one person or one
18 source to get information that may well be known to the
19 company in some other place.

14:52:38 20 You're telling me that you're going to actually be
21 looking at different sources.

22 MR. MALATESTA: Yes, Your Honor.

23 Our argument is that those additional sources should
24 not be Koko Mackin and Robin Stone.

14:52:48 25 THE COURT: Oh, I understand.

1 You know, but the example you give: You're going to
2 be looking in sales, but you're also going to be looking for
3 essentially that same information in the executives.

4 MR. MALATESTA: Yes, Your Honor.

14:52:56 5 I mean, we looked at our production slate before we
6 submitted our response. And what we found is, on average, we
7 are designating at least seven production custodians to each
8 RFP.

9 THE COURT: All right. All right.

14:53:14 10 Mr. Ragsdale?

11 MR. RAGSDALE: What it boils down to,
12 Judge, is 23 custodians is perfectly fine, but 25 would just
13 gum up the whole process. Those two additional custodians
14 would bog us down to the point we couldn't complete
14:53:40 15 discovery.

16 We don't believe that's true. We don't believe that
17 the 500,000 files that they talk about -- they've not told
18 us, for example, how many of those involve communication with
19 people outside of the Blue Cross hierarchy where we may not
14:53:54 20 have any other source of being able to get that information.

21 It is -- they have not shown, for example, that
22 there are not communications with governmental regulators,
23 governmental authorities, which might not include some of the
24 other custodians that they have done.

14:54:12 25 As I hear the argument, we should already know what

1 we want before we ask for it; we should already know what's
2 in their files before we ask for them; and that we have some
3 burden to demonstrate to this Court what exactly we're going
4 to get when we ask the question. That's not discovery. It
14:54:32 5 wouldn't be called discovery. It would be called
6 confirmation if that were the case.

7 The second problem with their argument is I think
8 they assume that we are only strictly limited, based on
9 relevancy, to the public comments that found their way into
14:54:46 10 the media. That's not true at all.

11 Simply we have pointed to those as examples of where
12 they have made public statements which indicate that they are
13 involved in the issues which are involved in the case.

14 And frankly, the summary which they've provided to
14:55:04 15 you on Page 8, even there there's an article that's quoted
16 from May 8th, 2012, in which it says a spokesman for Blue
17 Cross disputed that it gave the company a monopoly, noting
18 that other providers had until 2014 to build their networks.
19 I have no idea what other emails there may be related to
14:55:30 20 statements like that.

21 The truth is this, Judge: If this case is decided
22 on a rule of reason analysis, which we, of course, don't
23 believe it should be, but that is a possibility, Alabama will
24 be trying to demonstrate its procompetitive effect of its
14:55:48 25 market approach. And that will implicate not only the type

1 of governmental affairs and regulations that we've talked
2 about but all of these public statements that talk about the
3 community-wide effects of Blue Cross.

4 And these are the two individuals who are uniquely
14:56:04 5 situated to make those kind of disclosures and have those
6 kinds of documents.

7 Again, their argument is we've asked for a lot of
8 things that neither of these two people will have any
9 involvement in. If that's true, there won't be any documents
14:56:20 10 related to those topic areas that they will have to produce.

11 The point is there are topics which clearly they
12 will have some involvement with and which we believe they are
13 likely to have discoverable information which may not be
14 produced through the other 23 custodians that they have
14:56:38 15 designated.

16 I would also say this -- and I think this is
17 important -- is the notion that we attempted in the meet and
18 confer process to say why don't we go RFP by RFP through all
19 of them to try to do that. And frankly, they were not
14:56:58 20 interested unless we could guarantee that it was less than
21 five RFPs that would involve these two individuals, which we
22 couldn't, of course, do beforehand.

23 So their complaint about the fact that we've
24 included some RFPs which may not implicate these two
14:57:14 25 custodians is a little bit of a red herring, because, in this

1 instance, we tried to do that. They weren't interested in
2 that. There is some reason they don't want these two
3 particular individuals to be designated. And it doesn't make
4 sense that it's purely economy of scale.

14:57:30 5 Any other questions that I can answer?

6 Thank you, Judge.

7 THE COURT: Mr. Malatesta?

8 MR. MALATESTA: Your Honor, brief reply.

9 We cite in our response the following from the
14:57:42 10 United States District Court for the Middle District of
11 Alabama in the case *Auburn University versus IBM*, 2011 West
12 Law 5190821: Quote, if the theoretical possibility that more
13 documents exist sufficed to justify additional discovery,
14 discovery would never end.

14:57:58 15 And Your Honor, during the meet and confer process,
16 our opening offer was 18 production custodians. They then
17 countered and said, we would like you to take into
18 consideration an additional 22 people. We ultimately agreed
19 to five of them.

14:58:12 20 And Your Honor, as you said, the standard here is
21 what is a reasonable approach to discovery. It is not
22 perfection. If that was the standard, we'd have to designate
23 hundreds of individuals within the company. We believe that
24 the ten million files we've collected for search from these
14:58:30 25 23 individuals are the central figures to revolve these RFPs.

1 We don't need to go exploring Ms. Mackin and
2 Mr. Stone's files, given the very -- the lack of the factual
3 nexus that's been demonstrated through these articles.

4 The one that Mr. Ragsdale specifically cites is an
14:58:46 5 AL.com article from May 8th, 2012, concerning a potential
6 bill to require that any insurer who participates in the
7 state exchange must offer their health insurance products in
8 all 67 counties, which Alabama does. Other competitors have
9 cherry picked and only placed themselves in certain counties
14:59:02 10 within the state.

11 That is not responsive to an RFP. And that's where
12 there's the fatal flaw in the plaintiffs' approach here.

13 And Ms. Ragsdale's mischaracterized the negotiation
14 process.

14:59:16 15 What we said during negotiations was if you can
16 demonstrate a specific set of RFPs for which you believe
17 Ms. Mackin and Mr. Stone truly possess unique information,
18 we'll take under advisement. They've hung their hat on the
19 60-some-odd requests that they want from those two
14:59:36 20 individuals.

21 There is no justification for making us add these
22 two individuals for 40 percent of the RFPs. And our concern
23 is we have to draw the line in the sand somewhere. We feel
24 like we've taken a reasonable approach. The volumes are
14:59:50 25 already enormous. And discovery has got to end somewhere.

1 And these certainly -- these two certainly should not fall
2 into the fold.

3 THE COURT: All right. Thank you. All
4 right.

15:00:00 5 The next item on the agenda is Blue Cross Blue
6 Shield Association's motion to limit the time frames under
7 which document production is to be searched; that is, to
8 limit the time that they are required to search for
9 responsive documents.

15:00:20 10 MS. WEST: Ms. Cottrell will address that,
11 Your Honor.

12 THE COURT: Good afternoon.

13 MS. COTTRELL: Good afternoon, Your Honor.

14 As this Court is aware, we have been working through
15:00:30 15 what I'll call threshold discovery issues with plaintiffs for
16 sometime now.

17 These are those issues that have to be decided
18 before we can get to the real work: Processing all that
19 data; putting it in our tar engine; and, finally, reviewing
15:00:40 20 it and actually producing it to plaintiffs.

21 At the last hearing, in an effort to bring all these
22 issues to a close, we proposed that we spend a few weeks
23 working them out with plaintiffs, but if we couldn't, we
24 would bring them to Your Honor today.

15:00:56 25 We've made progress, in large part because we've

1 agreed to give a lot of documents from a long period of time.

2 On historical RFPs, plaintiffs served 61 RFPs that
3 relate primarily to key historical events in their complaint.
4 We've agreed to go back and search our historical files from
15:01:20 5 any time period. All the way back to the 1930s, if we need
6 to. So those are off the table.

7 On structured data, Mr. Ragsdale referenced this
8 already. They've asked for structured data from 1995 up
9 through 2015. We've agreed to give them structured data from
15:01:36 10 a 20-year time period.

11 There are other concessions, as well. The upshot is
12 that we will be producing billions -- I had to double check
13 this number. Billions, with a B, of rows of structured data.
14 And our IT vendor estimates that we're going to have to
15:01:52 15 process for review 33 million pages of unstructured data.

16 So that's what we've already agreed to do. Those
17 issues are resolved.

18 But there is one threshold issue that remains in
19 dispute. I call them the bookends. On the unstructured
15:02:10 20 data, the start date for 80 RFPs -- so it's not for all RFPs,
21 because we come to an agreement, like I mentioned, on those
22 historical. But there are 80 that concern primarily our
23 ongoing business operations.

24 We also dispute over the end date. Now, the end
15:02:28 25 date is for all 159 unstructured RFPs. The parties agree

1 that there needs to be a reasonable start date and an end
2 date. We just disagree over what they should be. We propose
3 a start date of 2005. That's two years before the statute of
4 limitations period. Plaintiffs propose a start date of 1995,
15:02:50 5 12 years before the start of that period.

6 As for an end date, we propose 2012, the date of the
7 filing of the original complaint. And plaintiffs? Up
8 through 2015.

9 If we implement plaintiffs' proposal, their sweeping
15:03:10 10 20-year proposal, our IT vendor estimates that 33 million
11 pages we're processing for review is going to skyrocket to
12 20 -- to 55 million pages.

13 Now, I want to pause here and highlight the fact
14 that this is not new information to plaintiffs. I know in
15:03:26 15 their brief they talk about how they're willing to continue
16 meeting and conferring but that they need information
17 justifying our burden.

18 On November 10th, I flew to Alabama and met with
19 plaintiffs in person. And I sat across from them to say, I
15:03:40 20 hear you. I hear you on what you want. But I'm telling you:
21 Our vendor is telling me that the data skyrockets by 40
22 percent if we don't impose a reasonable end date. If we go
23 to 2015, we're going to be dealing with millions upon
24 millions of additional pages.

15:04:00 25 I then wrote them a letter on November 17th and

1 said, in writing, we're seeing an increase of about 40
2 percent, on average.

3 THE COURT: Do I understand that as far as
4 going backward and looking for the time period from 1995 to
15:04:16 5 2005, if that's added into the pot, that really only adds
6 about four million pages?

7 MS. COTTRELL: That's exactly right.

8 THE COURT: It's really the later
9 information that generates the huge bulk of the additional
15:04:30 10 pages that have to be analyzed?

11 MS. COTTRELL: I think there are two
12 burden concerns. One is that on the end date, you're right.
13 When we're talking about the bulk of these documents, the 24
14 million, that's the 2012 to 2015 time period.

15:04:42 15 On the start end, the 1995 up through 2005, that's
16 about four million pages. Again, these are estimates,
17 because we're really dealing in terabytes.

18 THE COURT: Sure.

19 MS. COTTRELL: But there's an additional
15:04:56 20 burden problem with respect to those documents.

21 What we're hearing from our vendor -- and they
22 haven't yet been processed, so this is based on their
23 experience --

24 THE COURT: You may have access problems,
15:05:04 25 too. Accessibility, format problems.

1 MS. COTTRELL: Right. I'm not saying all,
2 but our vendor is saying, look. The older the data, legacy
3 data, we're in, you know, Windows 98. We're dealing with
4 Word Perfect applications. It is a different world. And so
15:05:16 5 pulling those may lead to difficulties on that side.

6 THE COURT: We couldn't dial our phone
7 today.

8 MS. COTTRELL: Fair point.

9 Unless Your Honor wants to spend more on the start
15:05:30 10 date, I was going to turn back to the end date.

11 So as I mentioned, we've pulled documents now from
12 25 custodians. That leads to two terabytes. The 33 million,
13 again, is from 2005 to 2012. And we go an additional 24
14 million pages -- again an estimate -- if we add this other
15:05:48 15 time period.

16 The reason for that is the way documents are stored.
17 So the closer in time you are to the present, if you look at
18 my email inbox or anyone's inbox, you're going to get more
19 documents the closer you are to current.

15:06:00 20 We've gone to plaintiffs, and we've told them about
21 this issue. And we've asked them, why do you really need the
22 post 2012 documents? Why are they so important? Can we work
23 out a deal where we factor in what you want and work out a
24 compromise?

15:06:18 25 We've consistently heard three things: We need them

1 because we allege an ongoing conspiracy and we have an
2 injunction claim. We need them because we have a damages
3 class up through the present. And we need them because there
4 just could be things we don't know about right now but they
15:06:30 5 could become important later on. And we want to be able to
6 insure our rights to get that information.

7 So we crafted a compromise in response to that. We
8 said, okay. On ongoing conspiracy, this is not a case where
9 we call it, you know, a game of Clue. We do not need to sift
15:06:48 10 through millions of pages to figure out was there an
11 agreement and, if so, what was it. It's out in the open.
12 It's in the license agreements.

13 So we told plaintiffs, we'll give you the license
14 agreements and the membership standards that contain the
15:07:00 15 restraints at issue up through the present.

16 On the damages point, we also worked out an
17 agreement. We said, if you are able to certify a damages
18 class or a settlement class, we'll give you the structured
19 data you need to make up those classes and show damages.

15:07:18 20 On the final point, this case has been pending for
21 some time. Three years. And plaintiff should know if there
22 are documents post 2012 that are relevant to their case. And
23 they should be able to tell us right now what those key
24 documents are.

15:07:34 25 If there are new issues that come up, for example,

1 the Anthem-Cigna merger, we're willing to entertain targeted
2 requests where good cause can be shown.

3 What we're seeing in the caselaw is that the default
4 end date is the filing of the complaint. And we don't see
15:07:50 5 any reason to deviate from that here. We think our proposal
6 with those carve outs to the present, along with the 2012 end
7 date, makes a lot of sense. Especially in light of the huge
8 burden.

9 THE COURT: You say the standard discovery
15:08:04 10 situation. And I recognize this is not a standard case. But
11 the standard, run of the mill federal lawsuit that -- the
12 standard for discovery is that the end date should be the
13 filing of the complaint -- there's not a requirement of
14 supplementation of ongoing discovery even after the -- during
15:08:24 15 the pendency of the lawsuit?

16 MS. COTTRELL: So I would say the
17 standard, under the caselaw, is a reasonable ending. But
18 what we see in the cases that we've cited, *RF Properties*;
19 *U.S. V. King*; *In re Ready-Mixed*; and *Heartland Surgical* --
15:08:36 20 what we're seeing is that, oftentimes, what is a reasonable
21 date coincides with the filing of the complaint. In terms of
22 an ongoing conspiracy charge in both *RF Properties* and *U.S.*
23 *King*, there was an ongoing misconduct. And the Court still
24 said an end date of the filing of the complaint is reasonable
15:08:56 25 and makes sense.

1 Unless there's other questions on the end date, I
2 will turn back now to the start date.

3 THE COURT: Sure.

4 MS. COTTRELL: So in terms of the start
15:09:06 5 date, again, plaintiffs want 1995 for those 80 RFPs I
6 mentioned that generally concern business operations. We're
7 proposing two years before the start of the statute of
8 limitations period. 2005.

9 Again, we think this is consistent with what we see
15:09:22 10 in the caselaw. Generally, Courts say it should be limited
11 to the statute of limitations period. And sometimes, you may
12 go back a year -- the year or two before that.

13 When you look at the RFPs at issue, it doesn't make
14 a lot of sense to go all the way back to 1995. So for
15:09:40 15 example, plaintiffs are requesting documents regarding plans'
16 reimbursement methodologies or setting of reimbursement
17 rates.

18 How plans set reimbursement rates in 1995 doesn't
19 have a lot of relevance to the case. The question is how are
15:09:58 20 they set during the class period. What would they be in the
21 but-for world.

22 They seek documents relating to procedures for
23 claims administration and payment of provider claims. Again,
24 how providers were paid 20 years ago with technology from 20
15:10:12 25 years ago doesn't seem that relevant to the core issues.

1 They seek information on our policies and procedures
2 concerning financial reporting. How we recognized revenues
3 in 1998, you know, not a core issue. I think they're more
4 interested in how to interpret our financial information, you
15:10:34 5 know, during the class period.

6 The requests also seek information relating to how
7 fee schedules are set, provider cost metrics, provider
8 quality data. So provider quality information from the 90s
9 up through '05. How reserves were set -- again, this would
15:10:48 10 be under different regulations from decades earlier. How old
11 admin fees were set.

12 We're agreeing to give this information. We're just
13 saying it should be limited to '05 to 2012. We don't see the
14 justification or the relevance, really, of going back in time
15:11:06 15 two decades.

16 Now, we touched briefly on the burden argument
17 before. The relevance here we really think is tangential.
18 There are at least four million pages. And that's just
19 electronic documents, Your Honor. We didn't factor in any
15:11:22 20 paper documents from that time period.

21 But there are also other burdens that are unknown.
22 Once we get in, dealing with legacy data, problems that are
23 going to sidetrack us.

24 As Your Honor knows, we have a tight timeline. We
15:11:36 25 are committed to meeting the Court's deadlines. We have a

1 lot to do. And we've already agreed to give billions of rows
2 of structured data. We're reviewing tens of millions of
3 pages of unstructured data. We just think that the
4 reasonable end date of two years before the start of the
15:11:50 5 statute of limitations period up through the filing of the
6 complaint is sufficient in this case.

7 Unless there are any questions --

8 THE COURT: Well, when y'all set the
9 timeframes of 1995 to 2005, surely y'all recognized the
15:12:04 10 cutting-of-the-baby compromise at that, right? I mean -- and
11 I'm not saying that this is what I will do or should do, but
12 I mean, that ten-year difference sort of says the easy
13 compromise here is to just put it in 2000. Something like
14 that. Is there -- is there some thought given to that?

15:12:28 15 MS. COTTRELL: In terms of our discussions
16 with plaintiffs?

17 THE COURT: Yes.

18 MS. COTTRELL: So we've talked with
19 plaintiffs about whether or not they'd compromise on this pre
15:12:32 20 time period. And it's really -- we've heard nothing from
21 plaintiffs. No wiggle room or movement, really, on these
22 RFPs other than I will say we started with 159. 61 we agreed
23 to give unlimited. There were 20 -- only 20, but there were
24 20 that plaintiffs said they could accept an '05 or an '08
15:12:50 25 start date. Other than that, for this 80, we haven't talked

1 about the splitting-the-baby option.

2 I will say, just given the way electronic documents
3 are stored, I don't know how much that would help us. I
4 think that we are going to see legacy problems when you go
15:13:06 5 back to 2000 --

6 THE COURT: Sure.

7 MS. COTTRELL: -- for that five-year time
8 period. And I think the bulk of that four million is
9 actually from the early 2000s time period.

15:13:16 10 THE COURT: Is there some -- and I don't
11 mean to use a pejorative, like, magic about 2005, but was
12 there some kind of technology change or server change or
13 software change or something that makes 2005 an appropriate
14 cutoff date of some sort?

15:13:38 15 MS. COTTRELL: So I don't want to misspeak
16 on the technology. There's nothing that I am aware of today.
17 Doesn't mean it doesn't exist.

18 THE COURT: Right.

19 MS. COTTRELL: The 2005 thinking was
15:13:46 20 really the statute of limitations period here is 2007. And
21 that was our original proposal. So we moved off that '07
22 proposal and went back to 2005. Because what we're seeing is
23 that a lot of cases limit it to the statute of limitations
24 period, but some, when there's reasons, will go back a couple
15:14:04 25 of years. So that was our compromised proposal.

1 I'll also just add that the real compromise on our
2 part I think was agreeing to go back an unlimited time period
3 for those historical RFPs.

4 I mean, we're giving them -- you know, where a
15:14:18 5 document request is focused on a historical event, we're
6 giving it to them. We're giving it to them.

7 You know, on this structured data, they really made
8 a push for that. We're giving it to them.

9 But when it comes to these where it's hard for us to
15:14:28 10 see the rationale for going back earlier in time -- I just --
11 I read the requests and I struggle with it. And there is a
12 burden associated there. In light of those other significant
13 concessions we already made on time period, you know, we're
14 already going back to the 1930s and up to 2015 in some cases.
15:14:44 15 It just feels like this -- these particular requests should
16 be narrowed to that time period.

17 THE COURT: All right. Thank you.

18 Mr. Ragsdale?

19 MR. RAGSDALE: Thank you, Your Honor.

15:15:00 20 I'm going to make some preliminary comments. And
21 then Mr. Butterfield is going to present the argument.

22 Let me first say we were frankly surprised that the
23 defendants' response was a motion that was filed on Thursday.
24 It does not comply with this Court's order regarding
15:15:20 25 submission of discovery motions. Not filed 14 days before.

1 We just reached an agreement on that; that motions had to be
2 filed 14 days before the conference here. And this does not.
3 And there was no discussion about filing a formal motion at
4 this time.

15:15:36 5 I went back and looked at the transcript of our last
6 hearing. We talked about competing proposals. That's why
7 ours came in the form of a letter, as we had done previously,
8 not in the form of a formal motion.

9 THE COURT: Do you feel like you've had an
15:15:50 10 adequate opportunity to respond to it? And if you don't, I'm
11 certainly happy to -- I want everybody to have their full say
12 about these things.

13 MR. RAGSDALE: Fortunately, we've put a
14 little thought into that response. And we certainly are
15:16:02 15 prepared to argue. And we don't want this delayed another
16 month for that to be done. What we would ask is that,
17 pursuant to the order that was entered, amending discovery
18 order Number 1 that we have the opportunity to present a
19 written response to the motion. And we would ask that we be
15:16:18 20 allowed to have until Monday to do that.

21 THE COURT: All right.

22 MR. RAGSDALE: And of course, pursuant to
23 the order that was entered, there's no reply. So that will
24 be submitted to you by Monday, if that is acceptable.

15:16:28 25 THE COURT: That's fine.

1 MR. RAGSDALE: But we do intend to proceed
2 to argue the motion.

3 Some of the information that we got on Thursday was
4 new to us. We certainly had not seen the affidavit of
15:16:40 5 Mr. Ackert previously. Some of that information was
6 expanding on things that had been represented to us by
7 counsel. So we do feel like we need the opportunity to make
8 a written response.

9 I think, as Mr. Butterfield is going to point out,
15:16:52 10 as well, some of the accessibility aspects of the objection
11 we, frankly, had not heard before or had an opportunity to
12 address.

13 As I said, Mr. Butterfield is going to address the
14 substance of those things. But with that understanding, we
15:17:08 15 will provide a written response.

16 THE COURT: We certainly will wait to get
17 a response on Monday, then. Great.

18 Mr. Butterfield?

19 MR. BUTTERFIELD: Good afternoon, Your
15:17:24 20 Honor.

21 THE COURT: Good afternoon.

22 MR. BUTTERFIELD: I do agree with
23 Ms. Cottrell that it is useful to think of this issue in
24 terms of bookends. So there's a period that goes before
15:17:40 25 2005, and then there's a period that goes after 2012.

1 And let me just say that, in general, you know,
2 the -- you know, motion itself in my readings -- it basically
3 says we're asking for a lot of stuff here and the post 2012
4 material dramatically increases the amount of production.
15:18:12 5 That's a given. It's not a revelation, Your Honor, that, you
6 know, the later in time one goes in discovery issues, the
7 more ESI you're going to have because ESI does increase
8 exponentially.

9 And while the motion cites the new text of Rule
15:18:34 10 26(B)(1) which adds proportionality to the scope of
11 discovery, it doesn't really address proportionality. It
12 talks in terms of burden, burden, burden, burden. But that's
13 not the same, Your Honor, as proportionality.

14 So what I see in the motion is that it conflates the
15:18:54 15 concepts of proportionality, relevance, and accessibility.
16 And I want to unpack that a little bit today.

17 So in terms of relevance, I don't see anything new
18 in the motion, Your Honor. We've talked about the relevance.
19 And we've filed motions. We've argued here about why the
15:19:22 20 pre-2005 material is relevant. I don't intend to repeat that
21 today. We will address it, you know, in what we file after
22 this if you think there are questions there.

23 But -- and in terms of the accessibility of that
24 material, it's up to the defendants to raise the 26(B)(2)(b)
15:19:46 25 motion. They haven't. So we have asked them from Day 1: If

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1 you think that anything that you have is inaccessible, tell
2 us and we'll talk about that.

3 And until we saw this motion -- and the motion only
4 talks in terms of general -- in general terms about
15:20:02 5 accessibility. We're all ears. If they want to say, you
6 know, this -- we have Word Perfect documents or we have this
7 information in a place that's legacy data, we will talk about
8 that. We will -- we're happy to address that.

9 But this is not the proper way to raise
15:20:20 10 accessibility issues. That's raised in a Rule 26(B)(2)(b)
11 motion. That is their burden to raise them, to tell us and
12 the Court what they deem inaccessible and what they do not
13 intend to search for because it is inaccessible. And they
14 owe us an explanation and they owe the Court an explanation
15:20:40 15 as to why it's inaccessible and what the cost of recovery or
16 production would be. They haven't done those things.

17 So the fact that -- eluding to -- you know, eluding
18 to the fact that there may be issues with respect to that
19 older data, again, is not a revelation. We remain open to
15:21:02 20 talking with them about that. And we remain open to seeing a
21 Rule 26(B)(2)(b) motion if it's properly filed.

22 With respect to the later material, you know, I
23 looked closely at Mr. Ackert's affidavit. And what I learned
24 is -- so the total ESI collected, to date, is a little over
15:21:34 25 two terabytes. But -- this is a big but -- that information

1 hasn't been processed. So it hasn't been filtered for dates,
2 hasn't been de-duped. And we've learned from Mr. Ragsdale
3 what that means. It hasn't been deNisted. What that means
4 is they haven't removed, like, program files that are not
15:21:56 5 relevant to this. And so -- and it hasn't been subject to
6 email threading.

7 So once that happens, according to their own expert,
8 that's going to cut in half the volume of that information.
9 So it will be down to one terabyte.

15:22:14 10 Your Honor, this is a big case. Like others in the
11 room, we litigate big cases. A terabyte -- I don't want -- I
12 don't want to make light of it. A terabyte is a lot of
13 information. Okay? And I -- and it's -- and we all know ESI
14 is expensive. And I don't sit here and deny it. But in a
15:22:34 15 case like this, is a terabyte a lot of information? In my
16 experience, Your Honor, no. It's not.

17 THE COURT: Kind of like the old
18 prisoner's joke. You can do a terabyte standing on your
19 head.

15:22:46 20 MR. BUTTERFIELD: And I know they can.
21 I'm confident they can.

22 So and as you correctly pointed out, Your Honor,
23 it -- what they said in that affidavit cuts both ways because
24 what they've demonstrated is the burden, as they use it, in
15:23:04 25 producing that older data really isn't there. There's not

1 that much there to produce.

2 So if there is a burden, it's going to be an
3 accessibility burden. They have to tell us what that is, and
4 we have to address it. With respect -- but -- so, you know,
15:23:20 5 what is glaringly missing from the motion is, although they
6 use the word, "burden," and although they cite Rule 26(B)(1),
7 they don't actually go to the proportionality factors.
8 There's five factors there. And I submit to you they don't
9 go through them because they all cut against them.

15:23:44 10 There's significant issues at stake in this case.
11 There's -- it's no revelation that there's well over a
12 billion dollars that we're litigating about.

13 There's a new factor called the relative access to
14 relevant information. And when the rules committee came out
15:24:00 15 with that, everybody was scratching their head. Well, what
16 that means, Your Honor, is that in asymmetrical cases, one
17 side has the information; one side bears a greater burden to
18 produce that information. But that's not -- there's nothing
19 wrong with that. And the rules committee said so.

15:24:18 20 So -- and all of -- I submit that all of the factors
21 in Rule 26(B)(1), if you look at those and weigh those
22 factors, is the production of this information -- and while
23 it involves a burden -- I don't -- you know, it involves --
24 any ESI of this magnitude involves a burden, but is it
15:24:38 25 proportional to this case? I submit it is.

1 So we submit -- as far as why we need the newer
2 information, I mean, this is -- Ms. Cottrell summarized what
3 we've said in meet and confers. But this is -- you know,
4 this is a claim for injunctive relief. It's a claim
15:25:00 5 involving ongoing conduct.

6 And the fact that we filed the case a few years ago
7 doesn't mean that that conduct is not ongoing. And it
8 doesn't make less relevant what has happened since we filed
9 the complaint.

15:25:10 10 So I -- other than the fact that there's a lot of
11 information and, according to BCBSA, that causes a burden
12 really doesn't -- really doesn't address whether or not the
13 information is relevant and whether or not it is proportional
14 to this case.

15:25:32 15 We submit it is both relevant and proportional and
16 it should be produced.

17 THE COURT: Ms. Cottrell makes the
18 argument, though, that insofar as the injunctive relief claim
19 is concerned, whether or not there is some kind of
15:25:46 20 anticompetitive effect in the membership association, the
21 membership agreements, all of that -- that's all there in the
22 papers anyway, but there's nothing, really, in the last
23 couple of years that's going to change any of that.

24 So she's raising the point that the discovery period
15:26:04 25 from February of '12 up through today is not going to add

1 significant new information about the business model, about
2 whatever the membership agreements say and that sort of
3 thing.

4 And then insofar as a damage claim for ongoing
15:26:24 5 damages for anticompetitive effects after the filing of the
6 lawsuit from February of '12 to date, she's saying that the
7 structured data, as opposed to unstructured data, can supply
8 that information.

9 What do you say to that?

15:26:40 10 MR. BUTTERFIELD: Well, Your Honor, I
11 think, you know, we will -- we will -- I think it's better
12 addressed in the papers, frankly. And I think we would like
13 to do that. But we have indicated in numerous meet and
14 confers why we think that, you know, there's a need for
15:26:56 15 ongoing unstructured data. And I think probably it's best
16 addressed in the papers.

17 But there are -- there is -- you know, there
18 continue to be market analyses. There continue to be things
19 that we've requested in discovery that show the impact of the
15:27:14 20 structure that's been put in place by the defendants. And
21 those --

22 THE COURT: Conceivably -- and I'm
23 dubious that you'll find this, but conceivably, there could
24 be some market study done by Blue Cross Association that
15:27:26 25 says, oh my word. Look at the anticompetitive effect our

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1 business model has.

2 MR. BUTTERFIELD: And it's hard for us,
3 Your Honor, to point to documents we haven't seen.

4 THE COURT: Sure. Sure.

15:27:38 5 MR. BUTTERFIELD: So, you know, we -- you
6 know, we have put forward a series of documentary requests.
7 And, you know, we believe that -- them to be relevant. And
8 that hasn't really been an issue in the court.

9 So if they were relevant in 2011, that doesn't make
15:27:56 10 them less relevant in 2012. But we will -- you know, in our
11 papers, we will explain a little more about -- in answer to
12 your question.

13 I do want to say one thing. I did learn in the
14 affidavit -- we have been asking in meet and confers, okay.
15:28:10 15 When did you collect this information? Because we were --
16 you know, we threw out a date as far as an end date. But we
17 realized that, you know, once information is collected, it's
18 going to be difficult to collect it again.

19 So we did see more information about that in
15:28:30 20 Mr. Ackert's affidavit. And knowing that information -- what
21 I proposed, Your Honor, in a meet and confer was for them to
22 give us a schedule, a custodian by custodian -- when was your
23 collection complete on this custodian. That would make it
24 easier for us to objectively reach an end date with the
15:28:52 25 proviso that there may be a need to go back much later in the

1 case on good cause and ask them to collect new information.

2 But for the time being, you know, if they can give
3 us that kind of information, I think we could probably get
4 there as far as coming up with an end date.

15:29:10 5 And it's interesting, Your Honor, that they've
6 collected this information, according to Mr. Ackert's
7 affidavit, all the way into the summer of 2015. So it's been
8 collected. It just has to be processed and reviewed and
9 produced. I understand that there's some burden with that.

15:29:26 10 But they've gone through the trouble to collect this
11 information.

12 And we -- you know, for the reasons we've submitted
13 already and we will submit in the papers, we think it's
14 relevant and we think it's more than proportional to the
15:29:40 15 issues at stake and the other factors that go with Rule
16 26(B) (2) (1) .

17 THE COURT: I have generally said that the
18 request for production documents seem to me to be relevant to
19 issues in the lawsuit. But I want to be clear about that;
15:29:58 20 that the time frame that you're talking about may impact the
21 relevance of particular -- not generally all of them but
22 particular requests for production.

23 For example, if you're asking about the methodology
24 by which some accounting occurs, it seems to me that it's
15:30:20 25 much more relevant to ask that in 2010 than it would be in

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1 1995. But, now, y'all understand your case far better than I
2 do. So you may need to explain to me why certain requests
3 for production, going back to 1995, would still be relevant.

4 I mean, I don't want to mislead everybody to believe
15:30:42 5 that I have entirely foreclosed the question about whether
6 every particular request for production is relevant for every
7 time frame.

8 It may well be that on a request-by-request basis,
9 there are some that are relevant to 1995 and there are
10 others, it strikes me, that they're not relevant to 1995.

11 And going back to what I had previously asked the
12 parties to do is to group those requests into particular time
13 frames. That didn't seem to work as well as I had hoped it
14 would when I asked for it. But that was the thought behind
15:31:00 15 that is that there are certain requests that make sense and
16 make relevant sense, even back to 1995. There may be others
17 that do not make sense to me back to 1995.

18 MR. BUTTERFIELD: And Your Honor, the
19 parties have engaged in a lot of that dialog. And, as
15:31:40 20 Ms. Cottrell indicated, there's been agreement that some
21 documents go back, you know, historically before 1995.

22 THE COURT: Sure. Decades.

23 MR. BUTTERFIELD: But there's also been
24 discussion on a document-request-by-document-request basis
15:31:56 25 and, as Ms. Cottrell said, there have been agreements to 20

1 requests not to go back to 1995. So we have engaged in some
2 of that analysis. That doesn't mean that we won't continue
3 to do it. But, you know, we note your concern there, Your
4 Honor.

15:32:12 5 THE COURT: All right. Thank you.

6 MR. BUTTERFIELD: Thank you, Your Honor.

7 THE COURT: Ms. Cottrell?

8 MS. COTTRELL: Your Honor, in terms of an
9 additional filing by plaintiffs, we obviously have no
10 objection to that.

11 We will say this is a critical threshold issue that
12 we need decided soon so that we can load everything into our
13 tar engine and begin the review here. Every day that we
14 don't have an answer on this, it further delays our
15 processing which is why we raised it with Your Honor.

16 On the new Rule 26, Mr. Butterfield highlighted a
17 few factors, but he also left out a couple factors; namely,
18 the importance of the discovery being sought in resolving the
19 issues and whether the burden or expense outweighs its likely
20 benefit.

21 When we think about these RFPs, especially when we
22 think about these 80 RFPs, going back to 1995 up to 2005, it
23 is difficult to see how they are important to resolving the
24 issues in the case.

15:33:20 25 How we set reimbursement rates in 1998, how we paid

1 providers in 1999, what right or quality metrics were in 2000
2 just don't relate.

3 And I haven't heard from plaintiffs in any of the
4 meet and confers -- I'll tell you I talk to them sometimes
15:33:34 5 almost daily. I haven't heard from them in any of the meet
6 and confers why these are relevant.

7 They didn't go through the process, as you
8 requested, of grouping these RFPs by time period and telling
9 us for those time periods why are they relevant. They don't
15:33:48 10 do anything in their brief about why they are relevant. And
11 today, Mr. Butterfield also punted on that question and said,
12 we'll address that in our motion.

13 The reason is because they have difficulty
14 articulating how these particular RFPs that go to our
15:34:02 15 business and how our business is run, really, need to go back
16 in time. The historical RFPs we've already agreed to give.

17 Now, Your Honor, we have reached agreement on the
18 scope of the RFPs because, as they were originally drafted,
19 some were broad. Some were hard for us to understand. So
15:34:20 20 we've gone back and forth. And that is one area where we've
21 reached agreement. And I have a chart here that summarizes
22 our correspondence back and forth and what the current state
23 of play is of how that RFP should be interpreted.

24 And if I may approach, I'd like to give Your Honor a
15:34:36 25 copy of that.

1 THE COURT: Sure. That's fine.

2 MS. COTTRELL: The bottom line here, Your
3 Honor, is that plaintiffs spent a lot of time talking about
4 how this is a big case, about how a terabyte of data, which,
15:35:02 5 again, equates to 60 million pages of unstructured data for
6 review, isn't a lot of information in a big case. But they
7 don't spend a lot of time talking about how the RFPs for
8 these bookends and why these RFPs on these bookends matter in
9 this case. The reason they avoid that issue is because they
15:35:22 10 aren't that relevant.

11 We've shown that the burden is immense.
12 Particularly early with the post 2012 documents, it's huge.
13 And we have a tight schedule to meet in this case. We're
14 doing literally everything in our power to meet that
15:35:36 15 schedule. We have all hands on deck, pulling data,
16 collecting data. But it's going to take us a long time.

17 To suggest somehow that adding another 24 million
18 pages in this one-year period isn't going to be a huge burden
19 on us that could significantly delay discovery in this case
15:35:56 20 is just not reasonable.

21 At the end of the day, we've agreed to give
22 historical documents for an unlimited period; billions of
23 rows of structured data from our system from a 20-year time
24 period; information from 25 production custodians in response
15:36:12 25 to 150 document requests.

1 We've given them a sufficient amount of information
2 for a case of this size. More than enough information for a
3 case of this size.

4 Mr. Butterfield made the point that he wants to know
15:36:24 5 the date of collection in 2015 because if we've collected on
6 that date, there can't be an additional burden on us of
7 having now to process that data and review it.

8 That entirely ignores the burden. The burden is not
9 in collecting the data. The burden is in processing it.

15:36:40 10 Adding it to our tar engine and then reviewing all of those
11 millions of additional pages for confidentiality, privilege,
12 and responsiveness.

13 That's where the burden comes in. Not only from a
14 cost perspective but also from a time perspective.

15:36:56 15 And just the practical consideration here is that
16 we've already given a lot of data. We have a very short
17 discovery time period. And we just don't have time to focus
18 on tangential issues.

19 Unless Your Honor has any other questions --

15:37:12 20 THE COURT: No. Thank you. All right.

21 Mr. Butterfield, anything else?

22 MR. BUTTERFIELD: Your Honor, I have
23 nothing further. Thank you.

24 THE COURT: Thank you.

15:37:24 25 The final matter that I have on the agenda this

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1 afternoon is the joint notice of agreement to amend discovery
2 order Number 1. And I've read that. And as I understand it,
3 basically, it's just an extension of deadlines for coming up
4 with supplemental custodian lists.

15:37:42 5 Mr. Ragsdale, do you want to educate me about it?

6 MR. RAGSDALE: Not particularly. But I
7 will -- I think that's correct. That is the analysis.

8 We had gotten together and discussed the fact that
9 that deadline was approaching and thought it made sense to
10 extend that. And we were able to reach that agreement which
11 all sides agree to.

12 THE COURT: All right. Nobody has any
13 problem, then, with proposed order that's been submitted with
14 the motion? I can just go ahead and enter that, Ms. West?

15:38:12 15 MS. WEST: I think that's right, Your
16 Honor.

17 THE COURT: All right. Anyone else have a
18 comment about that just to make sure? Anyone out in the
19 ether?

15:38:24 20 MR. RAGSDALE: The only other point -- and
21 I don't know if you're at the end of your agenda, but I had a
22 question about obviously we have a discovery conference and a
23 status conference coming up on January 14th both with you and
24 then with Judge Proctor.

15:38:40 25 And my question was: Does that take the place of

1 the normally, regularly-scheduled discovery conference that
2 we would have later in January?

3 THE COURT: That would be my anticipation.

4 Anyone have any questions about that or problem with
15:38:58 5 that?

6 MS. WEST: Your Honor, if I might.

7 THE COURT: Yes.

8 MS. WEST: Since we're not going to see
9 you again until January, I'm sure I speak for all parties in
15:39:08 10 wishing you a -- and your staff a very happy holiday season.

11 THE COURT: Thank you. Thank you. I
12 appreciate that.

13 And I will certainly keep in mind Ms. Cottrell's
14 remarks that I need to get to this bookend issue as quickly
15:39:22 15 as possible.

16 MS. COTTRELL: Taking into account your
17 holiday, of course.

18 THE COURT: So I will try to commit to get
19 that to you as quickly as possible after I get the
15:39:30 20 plaintiffs' response on Monday.

21 Any other matters that we need to take up this
22 afternoon, then?

23 Mr. Ragsdale?

24 MR. RAGSDALE: None for plaintiff.

15:39:38 25 THE COURT: Ms. West, anything else?

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1 MS. WEST: None from the defendants, Your
2 Honor.

3 THE COURT: All right. Thank y'all very
4 much. I wish all of you a very happy holiday, as well.
15:39:48 5 Thank you.

6 (The Proceedings were concluded at
7 approximately 3:39 p.m. on December 12, 2015.)
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2 C E R T I F I C A T E
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4

5 I, the undersigned, hereby certify that the
6 foregoing pages contain a true and correct transcript of the
7 aforementioned proceedings as is hereinabove set out, as the
8 same was taken down by me in stenotype and later transcribed
9 utilizing computer-aided transcription.

10 This is the 18th day of December of 2015.

11 
12

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